IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

AND

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Tax Case (Appeal) No.340 of 2004

Commissioner of Income-tax
Coimbatore. Appellant

v.

M/s.Silical Metallurgic Limited
Coimbatore. Respondent

Tax Case Appeal is filed under Section 260-A of the Income-tax Act, 1961 against the order of the Income-tax Appellate Tribunal, 'C' Bench, Chennai made in I.T.A.No.2091(Mds)/95 for the assessment year 1992-93, against the order of the Commissioner of Income Tax (Appeals) Coimbatore date of Order 25.9.1995 IT. Appeal No. 203-C/95-96 PA.No. CQ-1002.

Against the order of the Deputy Commissioner of Income Tax Special Range II, Coimbatore PAN/GIR.No. 49-512-CQ-1002 date of order 2.2.1995 for the Assessment year 1992-93.

For Appellant : Mr.T.Ravikumar
Standing Counsel for Income-tax.

For Respondent : Mr.Venkata Narayanan for
Mr.Subbaraya Aiyar

JUDGMENT

(Judgment of the Court was delivered by
K.RAVIRAJA PANDIAN, J.)

The revenue has filed appeal against the order of the Income-tax Appellate Tribunal in I.T.A.No.2091(Mds)/95 for the assessment year 1992-93 dated 10.09.2003.

2. The relevant assessment year is 1992-93. The facts culminated in filing of the appeal are as follows:

The assessment of the assessee company for the relevant assessment year was completed under Section 143(3) of the Income-tax Act on

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22.02.1995 on a total income of Rs.19,59,020/-. In the course of the assessment proceedings the Assessing Officer found that the assessee had claimed deductions under Sections 80HH and 80I amounting to Rs.7,72,709/- on the ground that the three units at Pondicherry, Avanashi and Hosur were being new industrial undertakings eligible for deduction under Section 80I. Besides, the Pondicherry unit, being situated in a backward area, was eligible for deduction under Section 80HH. The four units earlier belonged to different companies and were assessed separately. They were amalgamated with effect from 01.04.1990 and the business was carried on and continued by the assessee company, being the amalgamated company.

3. The Assessing Officer was of the view that the assessee company which is the amalgamated company did not set up the aforesaid units and there was no provision in the Income Tax Act for granting the benefit of deductions under Sections 80 HH and 80I to the amalgamated company and thus rejected the claim of the assessee.

4. In respect of claim of depreciation, the assessee had added the unabsorbed depreciation of the amalgamating company to the written down value and claimed depreciation on the resultant amount. The Assessing Officer allowed depreciation only on the written down value and not on the value enhanced by the amount of unabsorbed depreciation of the amalgamating company.

5. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). In respect of depreciation, the Commissioner of Income Tax (Appeals) held that depreciation could be allowed only on the written down value as appearing in the balance sheet and there was no provision for enhancing the same by adding unabsorbed depreciation carried forward in the case of the amalgamating company. Regarding deductions under Section 80HH and 80I, the Commissioner of Income Tax (Appeals) by referring to the circular issued by the Central Board of Direct Taxes No.F.15/5/63-IT(A-I) dated 13.12.1963 wherein it was clarified that the successor would be entitled to the benefit of deduction under the old section 84, in respect of the unexpired period, and observing that though the circular was issued with reference to section 84, the same principle would apply to sections 80HH and 80I and that too with greater force in a case of amalgamation held that the amalgamated company would be eligible for the relief claimed in respect of the amalgamating companies prior to their amalgamation. Holding so, he directed the Assessing Officer to examine whether those units were eligible for deduction in the initial year and if so, to allow the admissible claim to the assessee for the assessment year under appeal.

6. Aggrieved by that portions of the order decided against them by the Commissioner of Income-tax (Appeals), the assessee as well as the revenue filed appeals before the Income-tax Appellate Tribunal. Regarding depreciation, the Tribunal held that the unabsorbed depreciation of the amalgamating company should not be deducted in computing the written down value of the assets in the hands of the amalgamated company and thus allowed the appeal filed at the instance of the assessee and directed the

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assessing officer to adopt the written down value. In respect of the appeal filed by the revenue questioning the correctness of the deductions under Sections 80-HH and 80-I, the Tribunal rejected the appeal filed by the revenue following the decision of the Bombay High Court in the case of COMMISSIONER OF INCOME TAX VS. DANDELI FERRO ALLOYS PRIVATE LIMITED (212 ITR 1). The correctness of the said order is now canvassed before this Court.

7. The appeal was admitted on the following questions of law:

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the amalgamated Company was entitled to depreciation on the written down value of assets as increased by the unabsorbed depreciation carried forward in the hands of the amalgamating company?
2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee company being the amalgamated company was entitled to deductions under Section 80HH and 80I in respect of the units set up by the amalgamating company?

8. We heard the argument of the learned counsel on either side with reference to the questions of law framed and taken up for decision on the materials on record.

9. In order to answer the first question of law, it would be proper to extract the relevant portion of section 43(6) of the Income Tax Act, 1961.

"

43. In sections 28 to 41 and in this section, unless the context otherwise requires --

.....

(6) "written down value" means --

(a) in the case of assets acquired in the previous year, the actual cost to the assessee;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income Tax Act, 1922 (11 of 1922) or any Act repealed by that Act, or under any executive orders issued when the Indian Income Tax Act, 1886 (2 of 1986), was in force:

.....

Explanation - 2A - Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company, and the amalgamated company is an Indian company, the written down value of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its business.

Explanation 3 - Any allowance in respect of any depreciation carried forward under sub-section (2) of section 32 shall be deemed to be depreciation 'actually allowed'. "

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10. From the reading of the Explanation 2A extracted above, it is patently clear that the written down value with the transferred capital asset to the amalgamated company would be the same as it would have been if the amalgamating company continues to hold the capital as asset for the purpose of its business. The statutory provision makes it clear that the written down value of the asset would be the actual cost of the assets of the assessee less depreciation allowed to the company. Any unabsorbed depreciation which was not set off for carry forward could not be taken into account. A similar view was taken by the Bombay High Court in the case of CIT v. Hindustan Petroleum Corporation Ltd. (1991) 187 ITR 1 which has been applied by this Court in the CIT v. Kothari Industrial Corporation Ltd., (2005) 274 ITR 600.

11. In the light of the reasoning stated in the above referred to decisions, the question of law has to decided against the revenue and the same is thus decided against the revenue.

12. A reading of the provision of sections 80HH and 80I of the Act, it is clear that the same has been incorporated to encourage the new industrial undertaking on fulfilment of certain conditions mentioned therein. If the conditions mentioned in the sections are complied with by the assessee, the benefit extended by the provisions has to be granted to the assessee. The amalgamation of one company with the other company cannot be regarded as a splitting up or reconstruction or by a transfer of a new business of the plant and machinery of the old business. With reference to the Companies Act, the amalgamation was also for the benefit of the two companies, i.e., amalgamating and amalgamated company and in the public interest and also in the interest of the shareholders. Viewed from any angle amalgamation cannot be regarded as a splitting up of the company for the purpose of negativing the claim under the Income Tax Act, which has been statutorily conferred on the company, if such companies fulfil the conditions stipulated therein.

13. Hence, we are of the view that the order of the Tribunal granting the benefit of Sections 80HH and 80I to the assessee company cannot be stated to be illegal or against the statutory provisions. A similar view has been taken by the Bombay High Court in the case of COMMISSIONER OF INCOME TAX VS. DANDELI FERRO ALLOYS PRIVATE LIMITED (212 ITR 1), in which the Bombay High Court held that the facts on record clearly established that the amalgamated company was already incorporated and formed and had come into existence on March 30, 1973 and had become an industrial undertaking carrying on industrial and commercial activities on and from June 20, 1973, i.e., prior to the amalgamation of the amalgamating company with the amalgamated company, which had become effective from October 31, 1973. The amalgamated company was not formed by the splitting up, or the reconstruction, of a business already in existence. Therefore, the Tribunal was right in holding that the assessee company was entitled to relief under sections 80J and 80HH of the Act.

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14. We are in agreement with the view taken by the Bombay High Court in the above stated judgment which has been followed by the Tribunal for negativing the stand taken by the revenue.

15. For the reasons stated above, the second question of law is answered against the revenue and in favour of the assessee. Therefore, the appeal is dismissed.

usk

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Asst.Registrar,
   Income-tax Appellate Tribunal
   iIII Floor, Rajaji Bhavan, Besant Nagar,
   Chennai-90.

2. The Commissioner of Income-tax
   (Appeals), Coimbatore.

3. The Deputy Commissioner of Income tax,
   Special Range II, Coimbatore.

4. The Secretary, Board of Revenue, New Delhi.

+ One cc to Mr. N. Murali Kumaran, Senior Standing Counsel for income tax,
SR 61778
AKR (co)
sg 31/10/07

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